

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CAROL HELLER and THOMAS HELLER,	:	CIVIL ACTION
individually and as the parents	:	
and natural guardians of	:	
EMILY and KATHERINE HELLER	:	
	:	
v.	:	
	:	
SHAW INDUSTRIES, INC.	:	No. 95-7657

**MEMORANDUM AND ORDER**

Yohn, J.

November , 1997

Plaintiffs brought this action against defendant, a manufacturer of carpeting, claiming that the carpet they purchased from defendant caused them injuries due to off-gassing of various volatile organic compounds ("VOCs"). Finding the plaintiffs' proffered expert testimony was based on scientifically unsound testing methodologies, the court granted defendant's motion in limine to preclude plaintiffs' expert testimony. Because plaintiffs could not prove causation without this expert testimony, the court granted the defendant's motion for summary judgment. See Heller v. Shaw, Civ. No. 95-7657 (E.D. Pa. Aug 18, 1997).

Presently before the court are several motions dealing with the confidentiality of certain documents. Pursuant to a private confidentiality agreement, the parties agreed that all documents involving proprietary information would be produced by the parties, but were to remain confidential and were to be returned upon completion of the litigation. See Agreement of

Confidentiality at ¶¶ 2-4, 10. The agreement also provides that any dispute as to "whether or not any particular document or information which has been designated as confidential is in fact confidential" may be resolved by the court upon application by either party. Id. at ¶ 16.

In its summary judgment brief, plaintiffs attached a set of confidential exhibits marked "Appendix II" under seal with this court. Plaintiff has filed a motion to unseal "all documents designated as 'CONFIDENTIAL' or 'HI CONFIDENTIAL,' which were included in Appendix II to plaintiffs' memorandum." Pl.'s Mot. to Unseal Documents. The defendant has agreed that the vast majority of documents in Appendix II do not involve proprietary information and has agreed that they should be unsealed. The defendant does believe, however, that certain of the exhibits involve proprietary information which would be damaging to its interests if the documents should make their way into the hands of a competitor. Defendant has therefore moved the court for a protective order with respect to these documents requesting the court to keep these documents confidential

The court held a Pansy hearing on August 25, 1997, to determine whether these documents should be subject to disclosure. At the hearing, the parties agreed that the only exhibits before the court for a determination as to whether they should be unsealed are exhibits 2, 3, 10, 12, 16, 17, 18, 19, 20,

21 and 51 to Appendix II.<sup>1</sup> For the reasons set forth below, the court will deny the plaintiffs' motion to unseal and grant the defendant's motion for a protective order with respect to each of these documents.

### **DISCUSSION**

Federal Rule of Civil Procedure 26(c) allows the court to issue protective orders in discovery matters. The rule explicitly provides for the protection of trade secrets and proprietary information:

Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way . . . .

Fed. R. Civ. P. 26(c)(7).

"[A] party wishing to obtain an order of protection over discovery material must demonstrate that 'good cause' exists for the order of protection." Pansy v. Borough of Stroudsberg, 23

---

<sup>1</sup> The parties also disagree as to the redacted portions of certain depositions, but agreed that the resolution of the confidential status of the documents will enable them to reach agreement on the confidential status of the redacted deposition testimony.

Defendant's counsel confirmed to the court that Shaw is not seeking confidential treatment of exhibit 22.

F.3d 772, 786 (3d Cir. 1994). "Good cause" is demonstrated only upon a showing of "a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986). "The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order." Pansy, 23 F.3d at 786-87.

Further, when dealing with orders imposing confidential treatment of documents, courts must take into account "the strong public interest in open proceedings." Glenmede Trust Co. v. Thompson, 56 F.3d 476, 484 (3d Cir. 1995). Thus, in deciding whether good cause exists, the court must take into account several factors weighing for and against confidentiality. In Glenmede Trust, the court of appeals summarized these factors, originally set forth in Pansy, as follows:

- 1) whether disclosure will violate any privacy interests;
- 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
- 3) whether disclosure of the information will cause a party embarrassment;
- 4) whether confidentiality is being sought over information important to public health and safety;
- 5) whether the sharing of information among litigants will promote fairness and efficiency;
- 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
- 7) whether the case involves issues important to the public.

Glenmede Trust, 56 F.3d at 483 (citing Pansy, 23 F.3d at 787-91).

Thus, the focus of the courts inquiry is a "balancing of

private versus public interests" to determine whether the proffered interest in keeping certain information private must yield to the public's interest in obtaining the confidential information. Id.

The disclosure of trade secrets is subject to this balancing of public and private interests. See Smith v. BIC Corp., 869 F.2d 194, 199 (3d Cir. 1989) ("As a general rule courts 'have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure.'"). The Third Circuit has defined trade secrets as follows:

A trade secret consists of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

BIC Corp., 869 F.2d at 200.<sup>2</sup>

---

<sup>2</sup> The BIC court held that, in a diversity action, the court should apply state law in determining whether particular information is a trade secret. The definition cited above is an application of Pennsylvania law. The parties have not addressed whether Pennsylvania or Georgia law should govern the definition of "trade secret." The court has reviewed the law of Georgia and found it to be substantially similar. The Georgia legislature has defined a "trade secret" as:

information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers which is not commonly known by or available to the public and which information:

The court has reviewed the documents in question and weighed the defendant's allegations that the disclosure of the information contained therein would harm its business interest if released against the public's interest in obtaining access to these documents. My findings are set forth below.

A. Documents Involving Formulas

Exhibits 2 and 3 involve specific formulas for latex compounds used in defendant's product. They contain the specific amounts of various chemicals used to produce the product. Shaw claims the documents are entitled to confidential treatment because:

[t]hese formulas are, in lay person's language, the "recipes" for various SBR latex compounds used to manufacture Shaw's products and are provided to Shaw by one of its raw material suppliers . . . . These formulas are developed specifically for Shaw and are not available to Shaw's competitors. This information is considered in the industry to be proprietary in nature and is not shared between manufacturers. . . . It would be detrimental to Shaw for its competitors to learn information about the constituents and makeup of Shaw's raw materials used in the manufacture of its products.

Laughter Aff. at ¶ 3.

---

(A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ga. Code Ann. § 10-1-761(4); see also Avnet, Inc. v. Wyle Lab., Inc., 437 S.E.2d 302 (Ga. 1993).

The court has reviewed these documents and agrees that they contain sensitive trade secrets which should remain confidential. The documents contain the specific amounts of various components which are included in the defendant's product. It is beyond speculation that release of this information to defendant's competitors would adversely affect the defendant's proprietary interest and defendant has a legitimate reason for keeping these formulas secret and confidential. Shaw's explanation above provides a specific allegation of harm it would suffer if this information were to be released, substantiated by articulated reasoning. See Pansy, 23 F.3d at 786.

The public's interest in this information is outweighed by the defendant's interest in keeping the formulation of its product from its competitors. At oral argument, plaintiffs' counsel suggested that the documents containing the latex formulation were relevant in attempting to prove plaintiffs' case. Perhaps, but the mere fact that the documents were relevant to plaintiffs' case does not mean that the public at large should be entitled to access the documents. Indeed, plaintiffs have failed to articulate any specific reason as to why the public needs the information contained in this document. The general components in defendant's carpeting can be gleaned from other sources. See, e.g., Appendix to Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at exh. 11. The public does not need to know the specific combination of those components used in manufacturing the defendant's product.

The court concludes that the plaintiffs have a strong and specifically articulated reason for keeping the information in exhibits 2 and 3 confidential which outweighs any interest the public may have in accessing the information. The court will therefore grant the defendant's request for a protective order maintaining the confidentiality of these documents.

#### B. Documents Involving Tests

Documents 10 and 51 involve internal tests for VOCs that Shaw performed on its carpeting. Document 12 lists the result of internal tests run by Shaw on its carpeting and the costs of these testing procedures, and recommends how to proceed with any further VOC testing. Documents 21 also contains the results of internal tests on carpeting performed by Shaw. Shaw argues that these documents should remain confidential because

The testing methodology was developed by Shaw at great expense, and the results of this type of testing have been used by Shaw to evaluate Shaw's products and manufacturing processes with respect to carpet emissions. . . . Shaw's competitors would obtain an unfair advantage if they were provided access to this data developed by Shaw. Also, to the extent that such reports are made available to Shaw's competitors without information explaining the testing methodology, the processes involved, and a correct interpretation of the results, the results could be misleading and Shaw's competitors could attempt to use such data to Shaw's detriment in the market place.

Laughter Aff. at ¶ 4.

The Third Circuit has held that results of "safety or quality test information" are trade secrets subject to protection under Pennsylvania law. See BIC Corp., 869 F.2d at 201; see also

supra note 2 (Georgia law). Companies should be entitled to perform safety tests on their products without fear that the results will be made available to their competitors, and possibly inaccurately exploited to their detriment. Shaw developed these tests in order to become more familiar with its own products and it is certainly entitled to keep the results of those tests, performed at its own expense, from its competitors. Shaw has provided a specific allegation of harm which would befall it were this information to be released to the public at large and, in turn, its competitors.

The public certainly has some interest in obtaining the results of safety tests on Shaw's carpeting. See Pansy, 23 F.3d at 787 ("Circumstances weighing against confidentiality exist when confidentiality is being sought over information important to public health and safety . . . ."). The public's interest in accessing the particular information at issue here, however, is not particularly strong. First, Shaw contends that it has made the results of some of its test data available to the public through articles and discussions at conferences. See Laughter Aff. at ¶ 5. The public has, therefore, been given the "basic" results of the tests conducted by Shaw--they do not need to have the specific test results of individual tests contained in the exhibits plaintiffs seek to unseal. Further, the public has access to tests performed on Shaw carpeting by entities other than Shaw, and nothing prevents interested parties from running their own tests on defendant's products. Likewise, other

interested parties can seek release of the documents based on their own interests.

More importantly, however, the court has already concluded in its opinion granting defendant's motion for summary judgment that the tests at issue do not support the plaintiffs' contention that carpets pose a risk to health and safety. Because the test data do not demonstrate that defendant's products pose a risk to public health and safety, the public's interest in obtaining the specific tests performed by Shaw is outweighed by Shaw's interest in keeping this sensitive information from its competitors.

Plaintiffs' counsel also argues that one of the documents could be used to attack the credibility of a Shaw witness. However, plaintiff had the advantage of that document in this proceeding, and presumably any other plaintiff would be able to obtain the same document from Shaw in discovery in another proceeding so that there is no need to disseminate it to the world, and particularly to Shaw's competitors at this time.

Similarly, it is not necessary to permit plaintiffs' counsel to disseminate the documents to whomever he may chose in order to promote fairness and efficiency with other litigants. Those litigants can obtain the same documents, if relevant in their suits, through discovery in those actions and they will be produced subject to a confidentiality order which will meet their needs, but also accommodate Shaw's interest.

Finally, plaintiffs' counsel seeks to unseal the documents so that he may disseminate them to accommodate requests from

unnamed third parties. Those persons or entities could seek the unsealing of the documents on their own so that this court could balance their particular interests against those of Shaw.

Plaintiffs' counsel's effort to be "cooperative" does not seem a particularly strong interest.

### C. Documents Involving Customer Claims

The final set of documents, exhibits 16-20, detail Shaw's internal efforts to track complaints from its customers regarding VOC emissions from Shaw carpeting. Several of these documents include details of credits paid to customers for certain claims, while other documents analyze and break down the claims into different categories. Shaw contends that "information about Shaw's payments of claims and the amounts of those claims are reflective of Shaw's total cost of sales. This information, in the hands of Shaw's competitors, would place Shaw at a competitive disadvantage with regard to pricing information, as this sort of data regarding Shaw's competitors is not available to Shaw." Laughter Aff. at ¶ 6. Shaw expresses further concern that "Shaw's competitors could attempt to misuse data regarding the number of claims paid by Shaw to their marketing advantage by insinuating that Shaw has a larger number of claims than its competitors. Publicizing this data would be extremely misleading in light of Shaw's return policy and in the absence of information interpreting the claims histories." Id.

The court agrees that Shaw could suffer serious harm should this information fall into the hands of its competitors.

Certainly, this type of information constitutes a "compilation" or "customer list" which would be considered a trade secret under either Pennsylvania or Georgia law. See BIC Corp., 869 F.2d at 200; supra note 2. Shaw has a legitimate interest in attempting to keep information regarding customer complaints about its carpets from its competitors, especially in light of the fact that Shaw does not have the same information regarding its competitors.

The public's interest in this information is not particularly weighty. At oral argument, plaintiffs' counsel contended that the documents should be unsealed because they tend to rebut Shaw's statement to the Hellers that they did not receive any complaints from other customers about carpet emissions. But the fact that the documents might have been relevant to the instant litigation for purposes of rebuttal does not reflect an interest of the public at large to accessing these documents.

Nor do these customer claims represent any "information important to public health and safety." Pansy, 23 F.3d at 787. The court concluded in its summary judgment opinion that the plaintiffs have failed to demonstrate that defendant's carpeting poses a serious risk to public health under the facts of this case. Plaintiffs had an extensive opportunity to show that this type of information represented evidence of a risk to public health and safety, but failed to do so. Because the court has concluded that the plaintiffs have failed to demonstrate any real

risk to public health and safety from the defendant's product, the defendant's interest in keeping this sensitive information confidential outweighs any interest the public may have in obtaining access to the documents.

Again, plaintiffs' counsel is seeking to accommodate various unnamed third parties. If those persons are litigants in other jurisdictions they seek these documents in their own cases. If they are public interest groups, they can seek the documents here and articulate their own interests in obtaining them, which interests can then be balanced against those of Shaw.

\* \* \*

Defendant has agreed to unsealing the vast majority of documents plaintiff seeks to open to the public. The documents for which it seeks to retain confidential treatment contain sensitive proprietary information for which defendant has put forth specific and substantial allegations of the harm which would befall it were these documents released to its competitors. Plaintiffs have presented the court with no specific reasons whatsoever as to why this information should be made available to the public. The public, which has access to the vast majority of documentation in this case, does not need access to the particular documents for which Shaw seeks confidential treatment. The court will therefore grant the defendant's request for a protective order.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROL HELLER and THOMAS HELLER,	:	CIVIL ACTION
individually and as the parents	:	
and natural guardians of	:	
EMILY and KATHERINE HELLER	:	
	:	
v.	:	
	:	
SHAW INDUSTRIES, INC.	:	No. 95-7657

ORDER

AND NOW, this     day of November, 1997, after consideration of the plaintiff's motion to unseal documents, the defendant's response thereto, the plaintiff's reply, the defendant's motion for a protective order, and oral argument, IT IS HEREBY ORDERED that plaintiff's motion to unseal documents is DENIED. IT IS FURTHER ORDERED that defendant's motion for a protective order granting confidential status to exhibits 2, 3, 10, 12, 16, 17, 18, 19, 20, 21 and 51 in "Appendix II" to the plaintiffs' motion for summary judgment is GRANTED and those documents are to remain confidential and under seal.

---

William H. Yohn, Jr., Judge